(1) Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

WILFRED L. HARRIS, Individually and as Proposed Class Representative on Behalf of All Others Similarly Situated,

Petitioner,

v.

BILL OWENS, In His Official Capacity As Governor of the State of Colorado and JIM RIZZUTO, in His Official Capacity as Executive Director of the Colorado Department of Health Care Policy and Financing,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The diseases and illnesses wrought by tobacco products have caused States to incur billions of dollars in Medicaid expenses for the health care of their indigent citizens. In 1997, Colorado sued several tobacco companies to recover these Medicaid costs. In 1998, Colorado, along with 45 other States, the District of Columbia and various territories, entered a Master Settlement Agreement ("MSA") with several tobacco companies. In exchange for releasing all of their claims against the tobacco companies for Medicaid expenses, the signatories to the MSA will collect more than $206 Billion during the first 25 years of this settlement agreement. Colorado will collect approximately $2.82 Billion during the first 25 years of the MSA.

Under 42 U.S.C. § 1396k(b), the proceeds of a settlement with a third-party tortfeasor involving a Medicaid recipient must first be distributed to the federal and state governments. After the federal and state Medicaid programs have been reimbursed for their expenses, the statute provides that the Medicaid recipient receives the remainder of the settlement proceeds.

Whether 42 U.S.C. § 1396b(d)(3)(B), enacted as a rider to an appropriations bill, which explicitly waived the federal government's share of the proceeds from the MSA, also implicitly repealed the distribution protocol mandated by 42 U.S.C. § 1396k(b) with respect to the Medicaid recipients.

LIST OF PARTIES BELOW

In addition to the parties reflected in the caption, also defendants in the proceedings below were R. J. Reynolds Tobacco Co.; American Tobacco Co., Inc., Brown & Williamson Tobacco Corp., Liggett & Myers, Inc., Lorillard Tobacco Co., Inc., Phillip Morris, Inc., United States Tobacco Company, B.A.T. Industries, P.L.C., The Council for Tobacco Research – USA, Inc. and Tobacco Institute, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Wilfred L. Harris, individually and as proposed class representative on behalf of all others similarly situated, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 264 F.3d 1282. The opinion of the district court (App., *infra*, 24a-36a) is unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on September 10, 2001. The court of appeals entered an order denying timely petitions for rehearing *en banc* on October 31, 2001. (App., *infra*, 37a-38a). On January 18, 2002, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including March 30, 2002. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

42 U.S.C. § 1396k(b) provides:

(b) Such part of any amount collected by the State under an assignment made under the provisions of this section shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected shall be paid to such individual.

42 C.F.R. § 433.154 provides:

The agency must distribute collections as follows

(a) To itself, an amount equal to State Medicaid expenditures for the individual on whose right the collection was based.

(b) To the Federal Government, the Federal share of the State Medicaid expenditures, minus any incentive payment made in accordance with § 433.153.

(c) To the recipient, any remaining amount. This amount must be treated as income or resources under part 435 or part 436 of this subchapter, as appropriate.

42 U.S.C. § 1396b(d)(3)(B) provides:

(B)(i) Subparagraph (A) and paragraph (2)(B) shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products, as defined in section 5702(d) of Title 26, and State Attorneys General, or as part of any individual State settlement or judgment reached in litigation initiated or pursued by a State against one or more such manufacturers.

(ii) Except as provided in subsection (i)(19), a State may use amounts recovered or paid to the State as part of a comprehensive or individual settlement, or a judgment, described in clause (i) for any expenditures determined appropriate by the State.

STATEMENT

1. Wilfred L. Harris, on behalf of all Colorado Medicaid recipients who have been treated for tobacco related illnesses and diseases ("the Smokers"), filed this putative class

action seeking a declaratory judgment that the MSA[1] is a "Medicaid recovery settlement" that is governed by Title XIX of the Social Security Act in general and the distribution protocol set forth in 42 U.S.C. § 1396k(b) and 42 C.F.R. § 433.154(c) in particular. Both 42 U.S.C. § 1396k(b) and 42 C.F.R. § 433.154(c) provide that when a state collects past and/or future medical expenses from a third party tortfeasor on behalf of a Medicaid recipient, either through judgment or settlement, the Medicaid recipient is entitled to the amount remaining after the state and federal government have been reimbursed for the actual costs that each incurred for the treatment of the Medicaid recipient.

The gist of Harris' complaint is that the MSA was a "Medicaid recovery settlement" that released all of the Smokers' claims for past and future medical expenses against the tobacco companies, the third party tortfeasors who caused their illnesses and diseases.[2] Because the federal government has waived its interest in the proceeds of the MSA by virtue of, 42 U.S.C. § 1396b(d)(3)(B)(i), federal law, specifically 42 U.S.C. § 1396k(b)

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[1] In addition to Colorado, 45 other States, the District of Columbia, American Samoa, The Virgin Islands of the United States, the Commonwealth of the Northern Mariana Islands, The Commonwealth of Puerto Rico and Guam had all signed the MSA.

[2] Because the court of appeals did not decide whether the MSA is, in fact, a "Medicaid recover settlement," petitioner is not presenting that question for review. The court of appeals "assume[d] without deciding, that a portion of the claims settled in the Master Settlement Agreement were for Medicaid claims, because the settlement agreement explicitly included health-related claims and Colorado's complaint sought damages that included amounts for 'increased Medicaid payments.'" App., *infra*, 23a. at n. 7. *See also*, *id.* at 8a, citing 145 Cong.Rec.S2831 (daily ed. Mar. 17, 1999)(statement of Sen. Specter), noting that three States treated their settlement with Liggett Corporation, a tobacco company, as Medicaid settlements, and reimbursed the federal government for its share of the Medicaid costs recovered in those settlements.

and 42 C.F.R. § 433.154, mandates that after Colorado has reimbursed itself for Medicaid amounts paid for smoking related illnesses, the Smokers are entitled to a portion of the settlement proceeds.

Harris also seeks concomitant declaratory and injunctive relief to ensure that the respondents, Bill Owens, the Governor of the State of Colorado, and Jim Rizzuto, the Executive Director of the Colorado Department of Health Care Policy and Financing, prospectively comply with applicable federal law and regulations.

2. The facts of this case are as follows.[3] Harris, like tens of thousands of other Colorado residents, is a Medicaid recipient who has suffered from tobacco related diseases and illnesses and who has received and continues to receive treatment under Colorado's Medicaid program.

Congress enacted Title XIX of the Social Security Act in 1965 to create federal-state welfare programs that would pay the costs of necessary medical services provided to indigent individuals whose income and resources are insufficient to meet the cost of medical care. *Harris v. McRae*, 448 U.S. 297, 301 (1980). The two central purposes of Title XIX are to help indigent persons to "meet the costs of necessary medical services" and "attain or retain capability for independence or self-care . . ." 42 U.S.C. § 1396.

Federal and state monies jointly fund these programs, commonly known as Medicaid.. 42 U.S.C. § 1396; *Amisub (PSL), Inc. v. State of Colo. Dep't Soc. Servs.*, 879 F.2d 789, 794 (10th Cir.1989). While participation in the Medicaid program is voluntary, once a state accepts Title XIX funds it must abide by the purposes and provisions of Title XIX and the federal regulations enacted pursuant thereto. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 501 (1990).

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[3] Because the court of appeals affirmed the district court's dismissal of Harris' complaint under Fed.R.Civ.P. 12(b)(6), this Court accepts all material factual allegations in the complaint to be true and the court indulges in all reasonable inferences in favor of the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

Colorado elected to participate in the federal Medicaid program and has delegated the responsibility for administering the program to the Colorado Department of Heath Care Policy and Financing ("the Department"). C.R.S. § 25.5-1-201(1)(c). Respondent Jim Rizzuto is the Executive Director of the Department. The declared purpose of Colorado's Medicaid program is to permit indigent individuals "to attain or retain their capabilities for independence and self-care, as contemplated by the provisions of Title XIX of the social security act." C.R.S. § 26-4-102.

To facilitate recovery from third-party tortfeasors, Congress amended Title XIX in 1984, making a Medicaid recipient's assignment of rights for payment for medical care from third parties a mandatory condition of eligibility and requiring such an assignment provision to be included in each state Medicaid plan. Pub.L. No. 98-369, Title III, § 2367(b), 98 Stat. 1109, codified at 42 U.S.C. §§ 1396k(a)(1). Colorado has enacted such a statutory "automatic assignment" provision. C.R.S. § 26-4-106(4).

The federal Medicaid statutes and regulations mandate that States seek recovery of costs paid for medical treatment of Medicaid recipients for which third parties are legally liable. Title XIX requires States to take "all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services available under the (Medicaid) plan . . . " 42 U.S.C. § 1396a(a)(25)(A). In cases where liability is found to exist after medical assistance is provided, the federal statute directs the state agency in charge of administering the Medicaid plan to "seek reimbursement for such assistance to the extent of such legal liability." 42 U.S.C. § 1396a(a)(25)(B). A state is required to seek to impose third party liability for medical payments where the amount of recovery is likely to exceed the cost of recovery. 42 U.S.C. §1396a(a)(25)(C); 42 C.F.R. § 433.139(d)(3).

In enacting the "cooperation clause," 42 U.S.C. §1396k(a)(1), Congress observed that once a state has acquired, by mandatory assignment, the Medicaid recipient's right to payment for medical care from a third party, the state, not the Medicaid recipient, bears the responsibility to pursue third parties directly to collect payments for medical care:

> The conference agreement follows the Senate amendment with a modification clarifying that individuals are required to identify, to the extent they are able, potentially liable insurers and other third parties, and to provide information to assist the State in pursuing third parties. *Beneficiaries are not required to pursue the collections (of third party reimbursement) themselves. Pursuit is the responsibility of the provider or the State as provided elsewhere in this section.* (Emphasis supplied.)

Consolidated Omnibus Budget Reconciliation Act of 1985, H.R. Conf. Rep. No. 453, 544-45. *See also Dep't of HHS v. California Dep't of Health Servs.*, DAB No. 1504 (January 5,1995), 1995 WL 66334, at 5, n. 6.; HCFA State Medicaid Manual, §3905.3B.

All monies collected by a state pursuant to the third-party liability recovery requirement that exceed the amount expended by the state and federal government for medical treatment of a Medicaid recipient must be paid to the Medicaid recipient. 42 U.S.C. § 1396k(b).

The third-party liability recovery requirement avoids future Medicaid expenditures by treating remainder payments, *viz.*, those payments required by 42 U.S.C. § 1396k(b), the payment of which is the subject of this lawsuit, as income or resources of the Medicaid recipient when determining their future eligibility. *See* 42 C.F.R. § 433.154(c). A Medicaid recipient obtaining such proceeds would likely be removed from the Medicaid rolls, thus fulfilling the objective of Colorado's Medicaid Assistant Act for Medicaid recipients "to attain or retain their capabilities for independence and self-care, as contemplated by the provisions of Title XIX of the social security act." C.R.S. § 26-4-102.

It is against this federal statutory and regulatory background that Colorado brought its lawsuit against the tobacco companies.

In 1997, Colorado sued several the tobacco companies. In its Second Amended Complaint, Colorado alleged that: "[t]he Tobacco Companies' unlawful conduct described herein has wrongfully increased medical costs to the State of Colorado,

including, but not limited to, increased Medicaid payments;" "Colorado's increased health care costs caused by the Tobacco Companies conduct is in the hundreds of millions of dollars;" "[t]he amount paid for Medicaid is higher than it would be otherwise due to payment for tobacco-related illnesses;" and "[t]he present value of Colorado's Medicaid expenses attributable to smoking is hundreds of millions of dollars." In its Second Amended Complaint, Colorado prayed for damages "in the amount of increased health care costs paid by the State as a result of the Tobacco Companies' unlawful conduct as alleged herein."

In June 1997, before any of the individual state settlements were achieved, the Attorney General of Indiana sent a memorandum to all suing States that makes clear that Medicaid recoveries were central to the state lawsuits: "States are in the business of administering Medicaid, and Medicaid reimbursement was the primary element of damages for most, if not all, suing States."

Settlement payments by the tobacco companies are, in substantial part, designed to reimburse the States for tobacco related Medicaid costs, past and future. As then Colorado Attorney General Gale A. Norton stated, the amounts each state will receive under the MSA "will depend on the numbers of Medicaid recipients on each state's rolls, the cost of medical services and the amount each state contributed to Medicaid coverage historically." Milo Geyelin, "States Agree to $206 Billion Tobacco Deal," *Wall Street Journal*, November 23, 1998, B13. Two studies commissioned by the States in their tobacco litigation indicate a 96 percent and 98 per cent correlation between the distribution of funds from the Master Settlement with the distribution of tobacco-related Medicaid costs among the States. Leonard S. Miller, *et al.*, State Estimates of Medicaid Expenditures Attributable to Cigarette Smoking, Fiscal Year 1993, Public Health Reports, March/April 1998, Vol. 113, pp. 140-151; Vincent Miller, *et al.*, Smoking-Attributable Medical Care Costs: Models and Results, Berkeley Economic Research Associates, September, 3, 1997, Table 5.8.

As Mike Hash, Deputy Administrator, HCFA, testified at the hearing on Medicaid and the MSA and other tobacco

settlements before the Senate Subcommittee on Labor, HHS, Education and Related Agencies, March 15, 1999:

> The State tobacco settlements clearly include restitution for the costs to Medicaid for disease caused by tobacco . . . In exchange for settlement funds, all the States gave up all present and future claims, including all Federal Medicaid claims. These settlements legally prohibit States from making any future claims for tobacco-related Medicaid expenditures, and the Social Security Act does not authorize the Federal government from bringing Medicaid recoupment suits . .

The MSA releases all claims the States had against the tobacco companies "for past conduct, acts or omissions (including any damages incurred in the future arising from such past conduct, acts or omissions) . . . directly or indirectly based on, arising out of or in any way related, in whole or in part, to (A) the use ... or health effects of ... Tobacco Products . . . or any comparable Claims that were, could be or could have been asserted now or in the future in those actions or in any comparable action in federal, state or local court . . . ."

The MSA contains a release whereby the States "absolutely and unconditionally release and forever discharge" the tobacco companies from all claims that the States "directly, indirectly, derivatively or in any other capacity ever had, now have, or hereafter can, shall or may have" that were related to the "use" or "health effects" of tobacco products.

These releases signed by Colorado and other States discharged all of the Smokers' claims against the tobacco companies for past and future medical expense liability for the treatment of the Smokers' tobacco related illnesses because the Smokers had assigned to the State all of their rights to recover past and future medical expenses from the tobacco companies.

As a result of the sweeping scope of the release contained in the MSA or, at the very least, by operation of the doctrine of claim preclusion, the Smokers no longer have any legal right to pursue the tobacco company defendants for either past or future medical expenses arising out of their tobacco

related illnesses. Consequently, the settlement and release of the Smokers' medical expense claims assigned to Colorado by the Smokers triggers the settlement distribution protocol codified at 42 U.S.C. § 1396k(b) and 42 C.F.R. § 433.154.

After using the tobacco related illnesses and diseases suffered by the Smokers to extract a settlement from the tobacco companies that is estimated to be worth $2.82 Billion over the next 25 years, the respondents now maintain that the Smokers should receive nothing from the settlement. Harris seeks to restrain this illegal conduct.

3. On July 20, 2000, the district court entered its Memorandum Opinion and Order. App., *infra*, 24a-36a. The district court granted the respondents' motion to dismiss under Fed.R.Civ.P. 12(b)(6), holding that the complaint failed to state a claim upon which relief can be granted, *id.* at 29a-31a, and under Fed.R.Civ.P. 12(b)(1), finding that the Eleventh Amendment barred Harris' complaint. *Id.* at 31a-34a.

The district court based its decision on the merits on four grounds. First, it found that Colorado's lawsuit against the tobacco companies "was not a Medicaid recovery action pursuant to an assignment of rights," and, therefore, held that 42 U.S.C. § 1396k(b) was inapplicable to the MSA. App., *infra*, at 30a.

Second, the district court held that the MSA does not establish that the tobacco companies are third parties who may be liable to pay for care and services under 42 U.S.C. § 1396k(b). App., *infra*, 30a. Third, the district court concluded that the releases contained in the MSA did not release the individual claims of the Smokers against the tobacco companies for medical expenses. *Ibid.*

Finally, the district court determined that the 1999 amendment to the Social Security Act, adding subparagraph (B) to 42 U.S.C. §1396b(d)(3), extinguished the Smokers' claim that they are entitled to a portion of the proceeds from the MSA under 42 U.S.C. §1396k(b). App., *infra*, 30a-31a.

The district court based its Eleventh Amendment decision on its finding that the funds to be paid to the State under the terms of the MSA are currently "assets of the State" and that "the relief sought by Plaintiff would have the retroactive

effect of divesting the State of a portion of these assets." App., *infra*, 34a. In addition, the district court held that the "requested relief would also constitute an intrusion on state sovereignty." *Ibid.*

3. The court of appeals reversed in part and affirmed in part. App., *infra*, 1a-23a. The Tenth Circuit reversed the district court's Eleventh Amendment holding, finding that Harris' complaint fell with *the Ex parte Young*[4] doctrine because it was directed to the prospective actions of the state officials and did not implicate any special sovereignty interests under *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 286-87 (1997). *Id.* at 8a-15a.

The court of appeals, however, held that a rider to the Emergency Supplemental Appropriations Act, Pub. L. 106-31, 113 Stat. 57, 103-04 (1999), which amended 42 U.S.C. § 1396b(d)(3) by adding subsection B, repealed the distribution protocol set forth at Section 1396k(b), not only as it relates to the federal government's share of the proceeds of the MSA, which is explicitly set forth in the language of clause (i), but also abrogated the vested statutory rights of the Medicaid recipients under Section 1396k(b), which is neither addressed in the language of the statute or its legislative history. App., *infra*, 15a-20a.

In its interpretation of the meaning of clause (ii), the court of appeals relied heavily on the debate in the Senate in which various Senators disagreed on the applicability of the Medicaid act to the MSA. App., *infra*, 16a-17a. The court of appeals seems to suggest that clause (ii) was added to resolve the legal status of the settlement proceeds from the MSA. *Ibid.* However, Congress explicitly address the legal status of the federal share of the proceeds from the MSA in clause (i).

The court of appeals found that the clause (ii) releases the MSA settlement proceeds from any claims Harris had to receive a portion of those proceeds. App., *infra*, 17a. In reaching its decision, the court of appeals relied on the language of clause (ii) that provides a State may use amounts "recovered

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[4] 209 U.S. 123 (1908).

or paid to the State" from the MSA "for any expenditures" it desires. *Ibid.*

Although the court of appeals found "some force" to Harris' arguments against its interpretation of clause (ii), which arguments are fully set forth below, it ultimately rejected those arguments. App., *infra*, 17a-20a.

REASONS FOR GRANTING THE WRIT

A. The question presented is important.

The question presented is important because it affects the largest settlement of a series of civil lawsuits in the history of the country, involving tens of billions of dollars and hundreds o f thousands of Medicaid recipients.

While it is difficult to estimate the total amount of money due over the first twenty-five years of the MSA because it is subject to "adjustments, reductions, offsets and carry-forwards among the Participating Manufacturers and among the Settling States," the National Association of Attorney Generals estimates that amount to be $206 Billion. *See* NAAG's web site: http://www.naag. org/ tobac/npr.htm. Using that estimate and the State Allocation Percentages set forth at Exhibit A of the MSA, the approximate amount of settlement proceeds over the first twenty-five of the MSA for Colorado is $2.82 Billion.

The fact that twelve States joined in an *amicus* brief filed in court of appeals evidences the importance of this case. That there have been twenty-five similar cases filed throughout the country demonstrates the nationwide significance of the issue raised herein. App., *infra*, 5a.

In addition, the rules of statutory construction upon which this petition and the court of appeals decision turns are fundamental principles that courts need to apply properly. The court of appeals decision either ignores these principles or applies them in ways that conflict with the rulings of this Court.

B. The Tenth Circuit's decision is wrong.

The holding of the court of appeals that a rider to the Emergency Supplemental Appropriations Act, Pub. L. 106-31, 113 Stat. 57, 103-04 (1999) amending 42 U.S.C. § 1396b(d)(3) implicitly abrogated the distribution protocol mandated by 42 U.S.C. § 1396k(b) with respect to the proceeds of the MSA is inconsistent with many of this Court's decisions involving statutory construction relating to: (a) interpreting the language used in a particular statute in the context of the entire statutory scheme and ensuring that an interpretation does not render any clause to be superfluous; (b) this Court's refusal to interpret appropriations bills as repealing by implication substantive legislation absent clear Congressional intent; (c) the use of the doctrine of "*expressio unius est exclusio alterius;*" and (d) retroactive legislation that deprives citizens of vested statutory rights. Finally, the court of appeals decision is contrary to the legislative history of 42 U.S.C. § 1396b(d)(3)(B)(ii).

a. The court of appeals decision conflicts with several of this Court's decisions with respect to interpreting words in a statute based on a holistic approach that takes into consideration the overall purpose of the pertinent statutory scheme.

The touchstone of statutory construction is to determine the intent of Congress and the first step in that process is to look at the plain meaning of the words used. *Pollard v. E.I. Dupont Nemours & Co.*, 121 S.Ct. 1946, 1951 (2001). This Court, however, has cautioned against analyzing any one term in isolation when determining the meaning of the words used. *Id.*, *citing Gade v. Nat'l Solid Wastes Management Ass'n*, 505 U.S. 88, 99, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) ("we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law").

Instead, this Court has described statutory construction as "a holistic endeavor" in which the meaning of a provision is "clarified by the remainder of the statutory scheme ... [when] only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *U.S. v. Cleveland Indians Baseball Co.*, 121 S.Ct. 1433, 1443 (2001),

quoting *United Sav. Ass'n. of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988).

Thus, in *Cleveland Indians Baseball Co.*, this Court ascribed a meaning to the term "wages paid" when used in the context of FICA and FUTA taxes that was different from the definition this Court had given to this very same term in the context of Social Security benefits eligibility based on the fact that the purposes of the statutes in which the term was used were different. 121 S.Ct. at 1444. Similarly, in *Gade*, this Court found that an interpretation of the Occupational Safety and Health Act proffered by a party "might be plausible" if one section of the statute at issue were viewed in isolation. 505 U.S. at 99. This Court, however, rejected that interpretation based on its finding that OSHA "as a whole" evidenced a contrary congressional intent. *Id.*

Applying these rules of statutory construction to 42 U.S.C. § 1396(d)(3), it is clear that Congress did not intend to divest Medicaid recipients of their statutory rights under 42 U.S.C. § 1396k(b) when it amended 42 U.S.C. § 1396b(d)(3) by adding subsection B in a rider to the Emergency Supplemental Appropriations Act, Pub. L. 106-31, 113 Stat. 57, 103-04 (1999). Reading 42 U.S.C. § 1396(d)(3) as an integrated whole, it is evident that Congress aimed the rider solely at the federal share of the MSA proceeds and not at the proceeds due Medicaid recipients:

- Subsection (A) expressly refers to the "share to which the United States is equitably entitled;"
- Subsection (B)(i) then says simply that that federal "share" shall not apply to the tobacco settlement; and
- Subsection (B)(ii) then says that States may use the sums "described in clause (i) for any expenditures determined appropriate by the State."

QED. The federal government did what the federal government was empowered to do—waive *its* share of the tobacco settlement. The federal government did not need to enact federal legislation to tell the States they could do what they wanted with *their* share. However, very clear, express, and unambiguous legislation assuredly *would* have been necessary

to tell the States and Medicaid recipients that the latter were to be summarily divested of their federal statutory rights. That simply did not happen.

The court of appeals interpreted 42 U.S.C. § 1396b(d)(3)(B)(ii) by focusing only on the language in clause (ii) that allows a State to use "amounts recovered or paid to the State . . . for any expenditure deemed appropriated by the State." App., *infra*, 17a. The court of appeals held that the terms "recovered" and "paid to" encompass all proceeds from the MSA, "even if those funds are in turn owed to a third party." *Ibid.* The court of appeals' interpretation 42 U.S.C. § 1396b(d)(3)(B)(ii) is in err for a number of reasons.

First, the court of appeals isolated the phrase "amounts recovered or paid to the State" in § 1396b(d)(3)(B)(ii) and ascribed a meaning to that phrase that is contrary to the overriding purpose of Title XIX - to benefit Medicaid recipients - thus violating the basic tenant of statutory construction set forth above. It is beyond peradventure that in enacting Title XIX, Congress intended to benefit Medicaid recipients. *Silver v. Baggiano*, 804 F.2d 1211, 1216 (11th Cir. 1986). As stated in 42 U.S.C. § 1396, the two main purposes of the Medicaid statutes are to help indigent persons to "meet the costs of necessary medical services" and "attain or retain capability for independence or self-care . . .

Enforcing the distribution protocol set forth in Section 1396k(b) with respect to the MSA accomplishes these overriding goals of Title XIX because it helps the Smokers meet the costs of medical services not covered by Medicaid. In addition, it assists in helping Medicaid recipients attain the capability for independence and self-care. Furthermore, it avoids future Medicaid expenditures because the remainder payments, *viz.*, those payments required by 42 U.S.C. § 1396k(b), the payment of which is the subject of this lawsuit, are treated as income or resources of the Medicaid recipient when determining their future eligibility. *See* 42 C.F.R. § 433.154(c). Medicaid recipients obtaining such proceeds would likely attain independence and the ability for self-care and the State could remove them from the Medicaid rolls.

The court of appeals' interpretation of 42 U.S.C. § 1396b(d)(3)(B)(ii), on the other hand, is flawed because it would only benefit the States while being inimical to the interests of Medicaid recipients, the persons Congress intended to benefit by enacting the statutory scheme of Title XIX.

Second, assuming, *arguendo*, that the contested language means that the money "recovered or paid to the State" is not subject to the distribution protocol of Section 1396k(b), the court of appeals fails to recognize that the relief Harris seeks precludes recovery by or any payment to the State of the funds that are due to the Smokers. The court of appeals actually recognized this fact in its decision:

> Harris seeks . . . an injunction *preventing the state from depositing [any funds owed to the Smokers after the state reimburses itself for its Medicaid expenses] into the state treasury* until the court determines what amount is due to the smokers. *The money Harris seeks has not yet been paid into the state treasury.* Since "the state cannot 'authorize' the officials to violate federal law" *Elephant Butte* [*Irrigation Dist. v. Dep't of Interior*], 160 F.3d. [602] 610 [(10th Cir.1998], if some of the money truly belongs to *Harris under federal law, the officials may not turn it over to the state treasury.*

App., *infra*, 9a-10a (emphasis supplied).

Thus, the amendment to 42 U.S.C. § 1396b(d)(3) does not abrogate the distribution protocol set forth in Section 1396k(b) because the funds at issue would never be "recovered or paid to the State."

Third, the court of appeals interpretation of 42 U.S.C. § 1396b(d)(3) is defective because it renders much of U.S.C. § 1396b(d)(3)(B((i) superfluous, contrary a basic maxim of statutory construction. *TRW, Inc. v. Andrews*, 122 S.Ct. 441, 449 (2001) (It is a 'cardinal rule of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant."). (Citations omitted.) In this case, if clause (B)(ii) releases a State from the requirement that all other

federal laws that previously restricted how the State may spend proceeds from the MSA, then the preceding language of clause (B)(i) is an unnecessary, superfluous foray into the technical workings of Medicaid law. Because the court of appeals interpretation renders an entire clause surplusage, this Court should reject that interpretation.

By contrast, Harris' interpretation breathes meaning into both clause (i) and clause (ii). In Clause (i), Congress renounced any claim for proceeds from the MSA. Congress added clause (ii) to permit the States to spend the money due to them under the MSA as they deem appropriate. This reading is consistent with the fact that there was competing legislation that would have required the States to use "a portion of such funds for tobacco use prevention and health care and early learning programs." 145 Cong. Rec. S2503; 145 Cong. Rec. at S2881-97 (daily ed. March 18, 1999).

b. The court of appeals decision also conflicts with this Court's long history of rejecting an interpretation of a statute that repeals by implication an existing statute, especially when the later enacted statute is an appropriations measure. "It is a cardinal principle of statutory construction that repeals by implication are not favored." *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976). Moreover, this Court especially disfavors repeals by implication in the appropriations context. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190-91 (1978). Congress must make clear its intention to implicitly repeal an existing substantive statue in an appropriations measure. *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440-41 (1992). In this case, Congress did not make clear, either in the language of the rider or in its legislative history, its intention to repeal 42 U.S.C. § 1396k(b).

This Court instructs that "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *J.E.B. AG Supply, Inc. v Pioneer Hi-Bred International, Inc.*, ___ U.S. ___, 121 S.Ct. 593, 605 (2001), quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Because both § 1396k(b) and the amendment to § 1396b(d)(3) can be read to co-exist, they must both be given effect.

The court of appeals suggests that common sense and "an appreciation of context" militate against the application of this doctrine. App., *infra*, 19a. The court of appeals reasoning is unavailing. As set forth below, the context of the amendment, *i.e.*, its legislative history that discusses "the federal share of the funds [from the MSA]," firmly supports the application of this particular principle of statutory construction in the context of its enactment. While it is true that the amendment "carves out an exception" to the distribution protocol, *App., infra, 19a*, the legislative history reveals that the carving was done with surgical precision - limited to "the federal share of the funds," leaving untouched the Medicaid recipients' share.

c. The court of appeals rejected Harris' reliance on the doctrine of *expressio unius est exclusio alterius* - to express one is to exclude the others. App., *infra*, at 18a. The court of appeals stated that "[w]e are skeptical of this maxim . . .". *Ibid.* The court of appeals skepticism is not well founded; the doctrine is a vibrant tool frequently used by this Court to discern legislative intent. This Court, in fact, recently employed this doctrine after the court of appeals expressed its doubts about its viability. *See TRW, Inc. v. Andrews*, 122 S.Ct. at 447 (applying the doctrine to avoid distorting the text of a federal statute). *See also, Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 167, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). It is also worth noting that the theory underpinning this cannon is well established. James Madison drafted the Ninth Amendment to address the concern "that, by enumerating particular exceptions to the grant of power, it would disparage those right which were not placed in that enumeration." 1 Debates and Proceedings in the Congress of the United States 456 (J. Gales & W. Sexon, ed. 1934).

The rider specifically relieved the State from the obligation of reimbursing the federal government for its Medicaid costs from the proceeds of the MSA, but failed to even mention the obligation of the State to pay the remainder of any recovery to the Medicaid recipients. Thus, under the doctrine of *expressio unius est exclusio alterius*, by specially addressing one prong of the distribution protocol of Section 1396k(b) and ignoring the other prong, one can conclude that Congress

intended that the rider was meant to affect only the prong specified in the amendment.

The court of appeals notes that the applicability of this cannon of construction is dependent upon context and that the fact that a drafter left out one item from a list "may reflect no more than a belief that other options are provided for elsewhere." App., *infra*, 18a, citing *In re Continental Cas. Co.*, 29 F.3d 292, 294 (7th Cir.1994). While this is a correct statement of the law, the context firmly supports the applicability of the cannon.

As noted in the Conference Report, and as more fully discussed below, the conferees were only concerned with the disposition of "the federal share of the funds" recovered from the MSA. H.R. Conf. Rep. No. 106-143 at 99. Thus, in the absence of a contrary legislative intent or purpose, the maxim of statutory construction *expressio unius est exclusio alterius* applies.

Moreover, the Medicaid recipients' right to a share of the proceeds from the MSA was not a situation in which a drafter omitted one item from a long list of items, believing that other options are provided elsewhere. *See* App., *infra*, 18a. The distribution protocol is comprised of only three recipients - the federal government, the States and the Medicaid recipients. The amendment addressed two of the three recipients, the federal government and the States. Thus, it can be reasonably concluded that the failure to address the remaining recipient – the Medicaid recipients - is of import and that the omission was not based on a belief that the rights of the Medicaid recipients to the proceeds of the MSA was abrogated elsewhere.

d. Interpreting the rider to void those requirements of Title XIX that mandate disbursement of funds to injured recipients would raise serious retroactivity problems. "Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

The court of appeals dismisses any due process concerns based their view that the amendment has a rational basis. App.,

infra, at 19a. The court of appeals misses the point of Harris' retroactivity argument which is based on the observation that it is inconceivable that Congress would have intended the amendment to have retroactive effect on Medicaid recipients without vigorous debate or at the very least some mention of its intent to do so. *See e.g., Immigration and Naturalization Service v. Enrico St. Cyr*, 533 U.S. 289, 299 (2001) ("First, as a general matter, when a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.").

If Congress had truly intended a retroactive confiscation of Medicaid recipients' entitlement to their portion of the tobacco settlement proceeds, it certainly would *not* have done so without even the remotest hint of its intention to do so, or any whisper of reference to the specific section of the Medicaid Act that confers the right of excess distribution upon recipients. Yet one searches in vain through the plain language of the Amendment and the extensive legislative history for a single such reference.

e. The legislative history of the amendment to Title XIX supports Harris' contention that the amendment only addressed the disposition of the federal funds that form one prong the distribution protocol triumvirate established by 42 U.S.C. § 1396k(b).

First, the Conference Report on the rider makes it clear that the primary intent of Congress in enacting the amendment to 42 U.S.C. § 1396b(d)(3) was to preclude the federal government from making any claim to proceeds from the MSA under 42 U.S.C. § 1396b(d)(3)(A)[5]:

> The conferees recognize that, absent Congressional action, the issue of the **Federal share of the funds** recovered under such settlement or judgments would be subject to litigation over the next several years, delaying

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[5] As set forth above, the secondary intent of the rider embodied in clause (ii) was to allow the States to spend the proceeds due to them under the MSA, including the federal share of Medicaid expenses, in any manner the States deem appropriate.

> the availability of **these funds** and putting planned State uses on hold. The conferees have adopted the Senate language in order to permit States which are delaying their plans for the use of **these funds** . . .

H.R. Conf. Rep. No. 106-143, at 99 (1999) (emphasis supplied).

As the highlighted words demonstrate, the focus of the conferees was "**the Federal share of the funds.**" There is nothing in the Conference Report or other legislative history that even hints at a Congressional intent to otherwise disturb the distribution protocol of 42 U.S.C. § 1396k(b).

Second, the legislative history is replete with statements of the co-sponsors of the rider limiting the effect of the rider to the federal share of the funds while at the same time devoid of any mention of the distribution that may be owed to the Medicaid recipients under 42 U.S.C. § 1396k(b). The chief sponsor of the rider, Senator Hutchinson from Texas, stated the federal government planned to "seize $18.9 billion of the State tobacco settlement funds **for Medicaid recoupment**" and "the bill I am introducing . . . will keep that from happening." 145 Cong. Rec.S. 1145, 1157. (Emphasis supplied.) Similarly, in introducing the rider, Senator Gorton from Washington, another co-sponsor, described it as thus: "I join my Senate colleagues in introducing this **legislation to prohibit the federal government from trying to recoup any funds** from state governments recovered from tobacco companies as part of their tobacco settlement or from determining how these funds should be spent. *Id.* at 1159. (Emphasis supplied.) Senator Leahy from Vermont, another co-sponsor, also described the rider as "legislation to **prohibit the Federal government from recouping any part of the [tobacco] settlement.**" *Id.* at 1161. (Emphasis supplied.) Senator Levin from Michigan, another co-sponsor stated "I will support an amendment to this bill which will keep in the States any so called '**federal share**' **funds.**" 145 Cong.Rec.2342. (Emphasis supplied.)

Third, all of the letters in support of the rider submitted to Senator Hutchinson by state and local entities, which were made a part of the Congressional Record, establish that the sole purpose of the rider, and the focus of the intense lobbying effort

behind it, was to prevent recoupment of the federal share of the proceeds of the MSA by the federal government. *See e.g.*, letter from National Governors Association ("A major priority for the nation's Governors during the 106th Congress is ensuring that **state tobacco settlement funds are protected from unwarranted seizure by the federal government**"); letter from National Conference of State Legislatures (referencing the "**threats of recoupment**"); letter from the National Association of Attorneys General (supporting the rider because it protects "the state tobacco settlements from **seizure by the federal government**"); letter from the National Association of Counties (referencing "**federal recoupment**" and "**the federal government's claim**"); letter from the National League of Cities (supporting the rider because it "would prevent the **federal government** from taking a portion of state tobacco settlement revenues"). 145 Cong. Rec. S 1145, 1157-58. (Emphasis supplied.)

Fourth, the fact that there is "nothing that indicates Congress considered the individual claims [of the Medicaid recipients] at all," App., *infra*, 20a, supports Harris' contention that the rider was not meant to address those claims, but was instead focused on the disposition of the federal funds. *See generally* 145 Cong. Rec. at S2828-36 (daily ed. March 17, 1999) and 145 Cong. Rec. at S2881-97 (daily ed. March 18, 1999). Because Congress did not consider the claims of Medicaid recipients when it amended Title XIX, one cannot reasonably conclude that Congress intended to retroactively take way their statutory claims to the proceeds from the MSA and to repeal, by implication, the distribution protocol codified at 42 U.S.C. § 1396k(b).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April, 2002.

(Any footnotes trail end of each document)

No. 00-1292

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILFRED L. HARRIS, Individually and as Proposed Class Representative on Behalf of All Others Similarly Situated,
Plaintiff-Appellant,

v.

BILL OWENS, in his official capacity as Governor of the State of Colorado; JIM RIZZUTO, in his official capacity as Executive Director of the Colorado Department of Health Care Policy and Financing,
Defendants-Appellees,

STATE OF NEW MEXICO; STATE OF CALIFORNIA; STATE OF GEORGIA; STATE OF HAWAII; STATE OF KANSAS; STATE OF MARYLAND; STATE OF MONTANA; STATE OF NEVADA; STATE OF NORTH CAROLINA; STATE OF TENNESSEE; STATE OF UTAH; STATE OF WEST VIRGINIA,
Amici Curiae.

September 10, 2001, Filed

COUNSEL:
William E. Zimsky of Abadie & Zimsky, Durango, Colorado, for Plaintiff-Appellant.

Andrew Patrick McCallin, Assistant Attorney General (Ken Salazar, Attorney General and Jan Michael Zavislan, Assistant Attorney General, with him on the brief), Denver, Colorado, for Defendants-Appellees.

Patricia A. Madrid, Attorney General, Santa Fe, New Mexico; John H. Clough, Assistant Attorney General, Albuquerque, New Mexico, filed a brief for Amici Curiae.

JUDGES:
Before EBEL, Circuit Judge, McWILLIAMS, Senior Circuit Judge, and OWEN,* District Judge.

OPINION BY:
EBEL

OPINION:

EBEL, Circuit Judge.

In recent years society has begun to recognize smoking as an important public-health issue. The historic 1998 agreement between most of the states and the major tobacco companies was a milestone in the ongoing attempt to address this issue. As part of a broad settlement of the states' claims, the tobacco companies agreed to pay over time hundreds of billions of dollars to the states. In view of the enormous amount of money at stake, it is perhaps not surprising that there has been considerable controversy about the status of the settlement funds.

In this case, a recipient of Medicaid benefits for smoking-related illnesses seeks a share of the settlement funds. He argues that when he applied for Medicaid benefits from Colorado, he assigned to the state his right to sue the tobacco companies for the injuries he has suffered from their products. He asserts that the state's comprehensive settlement covered his individual claims, and that under federal Medicaid law, after the state has reimbursed itself for the benefits it has paid out it must then turn over the excess funds attributed to the Medicaid settlement to the individuals whose claims were settled.

Contrary to a number of district courts that have considered similar cases, we hold that this suit is not barred by the Eleventh Amendment. It seeks prospective relief for an alleged ongoing violation of federal law, and the requested

relief does not implicate special sovereignty interests. On the merits, however, we find the suit foreclosed by a recent federal law amending the Medicaid statute. We hold that this law, passed in response to similar controversy over the federal government's right to control part of the tobacco settlement funds, releases the state from having to reimburse individual Medicaid recipients. We therefore affirm the district court's dismissal of the complaint in this case.

BACKGROUND

Medicaid is a cooperative federal-state program that provides medical services to those without resources to pay for them. See generally *42 U.S.C. § § 1396*-1396u. The federal government provides funding to a state's Medicaid program if it meets various statutory and regulatory requirements. At issue in this case is the requirement that the state condition eligibility for Medicaid benefits on recipients' assigning to the state any claims they have "to support . . . and to payment for medical care from any third party." § 1396k(a)(1)(A). The state's program must also provide that when a third party is found to be legally liable for the costs of a recipient's medical care, the state will seek reimbursement "to the extent of such legal liability," so long as the amount the state can reasonably expect to recover exceeds the costs of recovery. § 1396a(25)(B). Part of any money the state collects under this assignment

> shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected shall be paid to such individual.

§ 1396k(b) (emphasis added). Colorado administers a Medicaid program and requires that an applicant assign to the state "all rights the applicant may have to medical support or

payments for medical expenses from any other person." Colo. Rev. Stat. § 26-4-106(4).

In 1997, Colorado sued several major tobacco companies in Colorado state court for a number of violations of state law related to the manufacturing and marketing of tobacco products such as cigarettes, including false representations, restraint of trade, and racketeering. Although the complaint did not set forth a separate cause of action under Medicaid law, it requested (among other relief) damages (including treble damages) "in the amount of increased health care costs paid by the State," including "increased Medicaid payments."

In 1998, Colorado and most other states settled their lawsuits with the tobacco companies in what is called the "Master Settlement Agreement." It released the companies from past, present, and future claims by Colorado, including all health-related claims. The settlement required the tobacco companies to comply with various conditions, such as limitations on advertising. It also required the companies to make regular payments into an escrow fund, the amounts of which are subject to adjustment as market conditions change. Once the settlement agreement was finalized through a consent decree, Colorado became entitled to a share (about 1.37%) of these funds. The complaint estimates Colorado's share over the next 25 years at about $ 2.6 billion.

Wilfred Harris is a recipient of Colorado's Medicaid program who has been treated for smoking-related illnesses.[1] He filed this action under *42 U.S.C. § 1983*, alleging that (1) he assigned his right to sue the tobacco companies to Colorado; (2) Colorado settled his individual claims against the tobacco companies in its broad release in the Master Settlement Agreement; (3) part of the settlement funds therefore are subject to the distribution requirements of § 1396k(b); and consequently (4) he is entitled to some portion of the funds once the state reimburses itself for its Medicaid expenses.[2] The complaint asked for declaratory and injunctive relief against Governor Bill Owens and Jim Rizzuto, Executive Director of the Colorado Department of Health Care Policy and Financing. In particular, Harris sought to enjoin Defendants from depositing the settlement funds

into the state treasury until entitlement to the funds was resolved.

Defendants moved to dismiss for lack of subject-matter jurisdiction due to Eleventh Amendment sovereign immunity and failure to state a claim upon which relief can be granted. A magistrate judge recommended dismissing on both grounds. Over Harris's objection, the district court dismissed the case on both grounds.

Similar cases have been filed in at least twenty-five other states. Twelve of these states have joined an amicus brief filed in this case. Virtually every court, state or federal, that has considered one of these cases has dismissed it either because of sovereign immunity or because the Master Settlement Agreement was not a Medicaid settlement subject to § 1396k(b). E.g., *Watson v. Texas, 261 F.3d 436, 2001 U.S. App. LEXIS 17436, 2001 WL 883533 (5th Cir. 2001)* (merits); *Floyd v. Thompson, 227 F.3d 1029 (7th Cir. 2000)* (merits); *Cardenas v. Anzai, 128 F. Supp. 2d 704 (D. Haw. 2001)* (Eleventh Amendment); *Strawser v. Lawton, 126 F. Supp. 2d 994 (S.D. W. Va. 2001)* (merits); *Skillings v. Illinois, 121 F. Supp. 2d 1235 (C.D. Ill. 2000)* (merits); *Martin v. New Mexico, 197 F.R.D. 694 (D.N.M. 2000)* (Eleventh Amendment); *Barton v. Summers, 111 F. Supp. 2d 989 (M.D. Tenn. 2000)* (Eleventh Amendment); *State v. Superior Court, 83 Cal. App. 4th 597, 99 Cal. Rptr. 2d 735 (Ct. App. 2000)* (merits). The sole exception of which we are aware is Lewis v. State, No. LACV-037031 (Iowa Dist. Ct. July 21, 2000), an unreported decision denying Iowa's motion to dismiss with little discussion.

DISCUSSION

A. Jurisdiction and Standard of Review

Putting aside for a moment the Eleventh Amendment issue discussed below, the district court had jurisdiction under *28 U.S.C. § 1331.* We have jurisdiction under *28 U.S.C. § 1291.* We review de novo the district court's decision to dismiss this case on Eleventh Amendment

grounds and for failure to state a claim. *Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir. 1999)* (failure to state a claim); *ANR Pipeline Co. v. Lafaver, 150 F.3d 1178, 1186 (10th Cir. 1998)* (Eleventh Amendment). On a motion to dismiss for failure to state a claim, we accept all well-pleaded allegations as true and view them in the light most favorable to the non-moving party. *Sutton, 173 F.3d at 1236.*

B. Order of Issues

We first address the threshold question whether we must decide the Eleventh Amendment issue before we reach the merits of this case. In similar cases in other states, two federal courts have bypassed the Eleventh Amendment and dismissed on the merits. See *Floyd v. Thompson, 227 F.3d 1029, 1034-35 (7th Cir. 2000); Strawser v. Lawton, 126 F. Supp. 2d 994, 999-1000 (S.D. W. Va. 2001).* Although we agree with the Seventh Circuit that the merits of this case are more easily resolved than is the Eleventh Amendment issue, see *Floyd, 227 F.3d at 1034-35,* we are compelled by our precedent to decide the Eleventh Amendment issue first. See *Martin v. Kansas, 190 F.3d 1120, 1126 (10th Cir. 1999)* ("Because the State's assertion of Eleventh Amendment immunity challenges the subject matter jurisdiction of the district court, the issue must be resolved before a court may address the merits of Martin's underlying ADA claim."), overruled on other grounds by *Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 148 L. Ed. 2d 866, 121 S. Ct. 955 (2001).* Once effectively raised, the Eleventh Amendment becomes a limitation on our subject-matter jurisdiction, and we may not then assume "hypothetical jurisdiction" to reject a plaintiff's claim on the merits. Id.; cf. *Fent v. Okla. Water Res. Bd., 235 F.3d 553, 558-59 (10th Cir. 2000)* (holding that a proper Eleventh Amendment challenge strips the courts of jurisdiction for the purposes of the removal statute, *28 U.S.C. § 1447*(c)).

Some statutory questions are both logically antecedent to and similar in scope to the Eleventh Amendment inquiry. In those circumstances, it is appropriate for us to address the

statutory question first. For example, the Supreme Court has held that we can address whether a statute permits a suit against the state before deciding the Eleventh Amendment question. *Vt. Agency of Natural Res. v. United States, 529 U.S. 765, 779-80, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000).* Defendants do not dispute that they can be sued under *42 U.S.C. § 1983.*[3]

Unlike the question whether a statute authorizes a suit against a state, the question whether the suit states a claim upon which relief can be granted is neither logically antecedent to nor coincident in scope with the Eleventh Amendment inquiry. Cf. *Vt. Agency, 529 U.S. at 779* (distinguishing between whether the statute authorizes a suit against the state and the broader questions whether it authorizes a private cause of action at all or whether the complaint states a claim). Though it is generally our practice to avoid difficult constitutional questions when a case can be resolved on simpler statutory grounds, we decline to follow the Seventh Circuit's Floyd v. Thompson.

In Strawser, the district court partly circumvented the Eleventh Amendment analysis in a somewhat different manner. The court concluded that because the plaintiffs' claim failed on the merits, there was no ongoing violation of federal law, and so the Ex parte Young exception to sovereign immunity was inapplicable. *126 F. Supp. 2d at 1000.* We have held, however, that at this stage, the question is not whether the state officials "actually violated federal law"; rather, it is whether the plaintiffs have stated a "non-frivolous, substantial claim for relief" under federal law. *Elephant Butte Irrigation Dist. v. Dep't of Interior, 160 F.3d 602, 610 (10th Cir. 1998).* This is congruent with our practice under *28 U.S.C. § 1331*, the statute conferring federal-question jurisdiction: If the federal claim is not wholly frivolous, it suffices to establish federal jurisdiction even if it ultimately is rejected on the merits. *Martinez v. United States Olympic Comm., 802 F.2d 1275, 1280-81 (10th Cir. 1986).* Harris has alleged a violation of *42 U.S.C. § 1396k*(b), which states that the state "shall" reimburse itself and the federal government for Medicaid expenses and pay the remainder to the Medicaid recipient. While we ultimately

reject Harris's claim on the merits, it should not be characterized as frivolous. Cf. *Brown v. State, 617 N.W.2d 421, 427-28 (Minn. App. 2000)* (upholding the dismissal of a similar lawsuit but reversing the district court's award of sanctions against the plaintiffs' attorneys), cert. denied, *Brown v. Minnesota, 149 L. Ed. 2d 638, 121 S. Ct. 1655 (2001)*. Indeed, the Congressional Record reports that three states (Florida, Louisiana, and Massachusetts) treated their settlement with the Liggett Corporation, a tobacco company, as Medicaid settlements and reimbursed the federal government for its share of costs. 145 Cong. Rec. S2831 (daily ed. Mar. 17, 1999) (statement of Sen. Specter). If this settlement was treated as including Medicaid settlements under § 1396k(b), it is not unreasonable for Harris to argue that the Master Settlement Agreement is also subject to § 1396k(b). We therefore decline to follow Strawser.

C. Sovereign Immunity

The Eleventh Amendment states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Because the Amendment "stands not so much for what it says, but for the presupposition which it confirms," it has been interpreted much more broadly than its text would suggest. *ANR Pipeline, 150 F.3d at 1187* (quotation marks and alterations omitted). Among other things, it generally bars suits brought by individuals against state officials acting in their official capacities. *Elephant Butte, 160 F.3d at 607.* This bar does not apply, however, if the state waives its sovereign immunity, if Congress validly abrogates the state's immunity, or if the suit falls within the legal fiction of *Ex parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908). ANR Pipeline, 150 F.3d at 1187-88.* Harris argues only that this case falls within the Ex parte Young doctrine. A suit within the Ex parte Young doctrine is not considered a suit against the state; rather, it is a suit against individual state officers who are stripped of their official character. *Elephant Butte, 160 F.3d at 607-08.*

For the purposes of this case, the relevant features of the Ex parte Young doctrine can be summarized as follows: The Eleventh Amendment does not bar a suit against state officials in their official capacities if it seeks prospective relief for the officials' ongoing violation of federal law. See generally *Elephant Butte, 160 F.3d at 607-09; ANR Pipeline, 150 F.3d at 1188-89.* Even if these requirements are met, the suit will be barred either if the relief requested "implicates special sovereignty interests" and is the "functional equivalent" of relief that would otherwise be barred; or in cases involving only statutory rights, if Congress has prescribed a "detailed remedial scheme" for enforcing the right against a state. *ANR Pipeline, 150 F.3d at 1189-90.* Defendants do not contend that Congress has created a detailed remedial scheme to supplant Ex parte Young in this case, so we consider only whether this suit seeks prospective relief for an ongoing violation of federal law and whether the requested relief implicates special sovereignty interests and would otherwise be barred.

1. Defendants' Authority

Defendants argue that they lack authority under Colorado law to pay any portion of the settlement funds to Harris. In particular, citing Sections 32 and 33 of Article V of the Colorado Constitution, they argue that state funds can be disbursed from the treasury only through an appropriations bill passed by the state legislature. If they lack authority to provide the relief Harris seeks, they argue, they are not acting in violation of federal law and cannot be enjoined under Ex parte Young.

This contention is irrelevant in this case. Defendants misconstrue the nature of the relief Harris seeks. Harris seeks a declaratory judgment that once the state reimburses itself for its Medicaid expenses, he is entitled to a portion of the tobacco settlement funds that are to be paid to the state, and an injunction preventing the state from depositing these funds into the state treasury until the court determines what amount is due to the smokers. The money Harris seeks has not yet been paid into the state treasury. Since "the state

cannot 'authorize' the officials to violate federal law," *Elephant Butte, 160 F.3d at 610*, if some of the money truly belongs to Harris under federal law, the officials may not turn it over to the state treasury.

In addition, we are satisfied that the named officials have the authority to comply with federal law here. Defendant Owens wields the "supreme executive power of the state" and is charged with "taking care that the laws be faithfully executed." Colo. Const. art. IV, § 2. Defendant Rizzuto is charged with administering Colorado's Medicaid law, the Colorado Medical Assistance Act. See Colo. Rev. Stat. § 25.5-1-201(1)(c). As such, he appears to be empowered to take actions necessary to comply with federal Medicaid requirements. See Colo. Rev. Stat. § 26-4-105. Defendants can be enjoined to prevent the state from appropriating funds that belong to Harris or other Medicaid recipients.

2. Prospective Relief

As noted above, Harris seeks declaratory and injunctive relief. This suit is not prospective merely because the requested relief is framed in equitable terms rather than as a request for damages. See *ANR Pipeline, 150 F.3d at 1189* (citing *Edelman v. Jordan, 415 U.S. 651, 668, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974)).* Nor is it dispositive that the requested relief is likely to burden the state's treasury to some degree. *Elephant Butte, 160 F.3d at 611.* "The overriding question is not whether the relief will require the payment of state funds, but whether the relief will remedy future rather than past wrongs." Id. (quotation marks omitted); cf. *Nelson v. Miller, 170 F.3d 641, 646 (6th Cir. 1999)* ("Whether a suit against State officials in their official capacity is deemed to be against the State depends on whether the plaintiff seeks 'retroactive' or 'prospective' relief."). Although the Eleventh Amendment bars compensatory relief for past injuries, "relief that serves directly to bring about an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state

treasury." *Papasan v. Allain, 478 U.S. 265, 278, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986).*

Applying these principles, we conclude that at least part of Harris's suit is not barred by the Eleventh Amendment.[4] Most of the tobacco settlement funds due to Colorado have not yet been paid. Harris asserts that some of these funds belong to him under *42 U.S.C. § 1396k*(b) and seeks to prevent the state from depositing his portion into the state treasury. The alleged violation of federal law here is the appropriation that has yet to take place. Thus, with respect to these funds, Harris is seeking prospective relief from an ongoing violation. As such, his claim appears to fall within the ambit of Ex parte Young.

We disagree with those district courts that have found it "wholly irrelevant that payments [under the Master Settlement Agreement] will be made in fixed future installments rather than a lump sum." *Floyd v. Thompson, 111 F. Supp. 2d 1097, 1100 (W.D. Wis. 1999)*, aff'd on other grounds, *227 F.3d 1029 (7th Cir. 2000)*; accord *Martin v. New Mexico, 197 F.R.D. 694, 696 (D.N.M. 2000); Barton v. Summers, 111 F. Supp. 2d 989, 991-92 (M.D. Tenn. 2000)*; cf. *Strawser v. Lawton, 126 F. Supp. 2d 994, 1003 n.6 (S.D. W. Va. 2001)* ("Plaintiffs' proposed result . . . would permit, by analogy, any seeker of state funds to look for accounts receivable of the State and then attempt to garnish them before their purely ministerial transmission to the treasury.").[5] From a purely economic perspective, it may be irrelevant that the settlement funds are to be paid over time rather than all at once; the future amount can be reduced to a present value. For the purposes of the Eleventh Amendment, however, the difference is highly relevant. In Elephant Butte, we held that the Eleventh Amendment did not bar a suit seeking an injunction reforming a contract to prevent the state from taking the profits of a lease: "Because the lease agreement allegedly conflicted with federal law at its inception, the state officials' acts of signing the lease and subsequently accepting benefits under the assignment provision may constitute an ongoing violation of federal law." *160 F.3d at 609-10.* Similarly, in *Johns v. Stewart, 57 F.3d 1544, 1553-55 (10th Cir. 1995)*, we held that the plaintiffs

could not seek retroactive monetary reimbursement for federal Supplemental Security Income benefits that had been withheld by the state, but could seek prospective injunctive relief against future withholdings.

As in Elephant Butte and Johns, in this case the state officials' acceptance of the settlement funds solely for the state may constitute an ongoing violation of federal law. With respect to funds that have not been received, the officials have not yet violated federal law. The alleged harm to Harris is entirely in the future. The relief he seeks is therefore prospective in character and addressed to an ongoing violation of federal law.[6]

Defendants seek to analogize this case to *Papasan v. Allain, 478 U.S. 265, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986)*, but the foregoing discussion shows why that case is readily distinguishable. In Papasan, the Supreme Court held that the Eleventh Amendment barred a suit seeking declaratory and injunctive relief for breach of trust against state officials whose alleged mismanagement of school trust lands in the 1850s had led to significantly lower funding for certain school districts. *Id. at 274-75.* At the same time, however, the Court held that the Eleventh Amendment did not bar an equal protection claim challenging the disparity in school funding, because this claim sought relief from an alleged ongoing constitutional violation. *Id. at 282.* The claims barred in Papasan concerned alleged violations of federal law that were wholly in the past; for these, the courts could not provide relief even if styled as "prospective." In this case, as explained above, the alleged violation of federal law is ongoing. Harris's requested relief would "serve[] directly to bring an end to a present violation of federal law"; any effect it would have on Colorado's state treasury would be purely "ancillary" to the state's compliance with federal law. *Id. at 278.*

In sum, Harris seeks prospective relief for an alleged ongoing violation of federal law. While this suit, if successful, might deprive the state of future funds, that effect would be ancillary to compliance with federal law, not compensatory for past injuries.

3. Special Sovereignty Interests

The courts may not award relief against the state that "implicates special sovereignty interests" and is the "functional equivalent" of relief that would otherwise be barred by the Eleventh Amendment. *ANR Pipeline, 150 F.3d at 1190.* For example, the Eleventh Amendment bars a suit against a state that would divest it of sovereign control over some submerged lands because historically, "these lands are tied in a unique way to sovereignty." Idaho v. Coeur d' *Alene Tribe, 521 U.S. 261, 286-87, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997).* It also bars a suit seeking an injunction against a state property-tax system because "it is impossible to imagine that a state government could continue to exist without the power to tax." *ANR Pipeline, 150 F.3d at 1193.* On the other hand, the Eleventh Amendment does not "extend to every situation where a state property interest is at issue"; Coeur d'Alene represents an "extreme and unusual case." *Elephant Butte, 160 F.3d at 612;* cf. Coeur d' *Alene, 521 U.S. at 287* (referring to the "particular and special circumstances" of the case).

Defendants and Amici argue that the relief Harris seeks implicates four special sovereignty interests: the state's interest in (1) "making determinations about the nature and extent of its various educational and social services programs"; (2) "its revenue regardless of its source"; (3) "its appropriation prerogatives"; and (4) "its authority to fashion an appropriate remedy in law enforcement actions." None of these qualifies as a special sovereignty interest in this case.

The first two asserted interests can be dismissed straightforwardly on the basis of our precedent. First, the state has no special sovereign interest in ordinary aspects of its social programs, because "most government policies do not affect core aspects of a state's sovereignty." *Buchwald v. Univ. of N.M. Sch. of Med., 159 F.3d 487, 495 n.6 (10th Cir. 1998);* cf. *Branson Sch. Dist. RE-82 v. Romer, 161 F.3d 619, 632 (10th Cir. 1998)* (holding that the state has no special sovereign interest in managing lands held in trust). More to the point, a "state's interest in administering a welfare program at least partially funded by the federal

government is not such a core sovereign interest as to preclude the application of Ex parte Young." *J.B. v. Valdez, 186 F.3d 1280, 1287 (10th Cir. 1999)*. Second, the state has no special sovereign interest in future sources of revenue. See *Elephant Butte, 160 F.3d at 612*.

The third and fourth asserted interests may be more plausible in the abstract, but neither is sufficiently implicated by Harris's lawsuit to merit extensive discussion. Whatever the state's interest in its appropriations prerogatives, the relief Harris requests will not "impermissibly intrude upon the state's dignity and status as a sovereign government." *Elephant Butte, 160 F.3d at 613* (quotation marks omitted). Contrary to Defendants' apparent belief, Harris is not asking the legislature to pass an appropriations bill giving him money from the state treasury. Rather, he seeks to prevent Defendants from turning the tobacco settlement funds over to the treasury before he and the other smokers receive their portion. The state's interest with respect to these future funds is not related to appropriations but to revenue sources, an interest we have rejected as sufficiently special to serve as an exception to Ex parte Young. See *Elephant Butte, 160 F.3d at 612*.

Similarly, even assuming the state has a special sovereignty interest in shaping law-enforcement remedies, Harris's suit does not impermissibly intrude on this interest. Harris would not require the state to demand more or less money in its settlement with the tobacco companies, for example. The state and the tobacco companies have already determined how much money will be paid to the state; Harris merely seeks his portion (if any) of these funds. In that regard, Harris's claim is more analogous to the revenue interest we have already rejected.

In sum, "we cannot say the relief [Plaintiffs] request is as far-reaching or intrusive as that sought in Coeur d'Alene Tribe and ANR Pipeline." *Elephant Butte, 160 F.3d at 612*. As in Elephant Butte, "the remedy in this case only presents the possibility of a readjustment of priorities for the distribution of profits from," in this case, certain settlement funds. *Id. at 612-13*. It will have "minimal effect on the

sovereignty and autonomy" of Colorado, particularly since the "interests of vindicating the federal rights and answering the federal questions involved substantially outweigh the state's sovereign interests." *Id. at 613.*

4. Conclusion

Harris seeks prospective relief for Defendants' alleged ongoing violation of federal law. This relief does not implicate the state's special sovereignty interests. We thus conclude that his suit is not barred by the Eleventh Amendment. Because we have subject-matter jurisdiction over this case, we turn now to its merits.

D. Section 1396b(d)(3)(B)(ii)

The premise of Harris's lawsuit is that at least some of the settlement funds are subject to the requirement of *42 U.S.C. § 1396k*(b), which states that after the state and federal governments are reimbursed for their Medicaid costs, any remainder goes to the recipients.7 However, Congress rejected Harris's premise in a rider to the Emergency Supplemental Appropriations Act, Pub. L. No. 106- 31, 113 Stat. 57, 103-04 (1999), which added this provision to the Medicaid act:

> Except as provided in subsection (i)(19) [which prevents federal funding for the states' administrative costs of tobacco litigation], a State may use amounts recovered or paid to the State as part of a comprehensive or individual settlement, or a judgment, described in clause (i) [which specifically names the 1998 Master Settlement Agreement] for any expenditures determined appropriate by the State.

42 U.S.C. § 1396b(d)(3)(B)(ii). Less central to this case, clause (i) specifically exempted the settlement funds from the requirement that the federal government be reimbursed

for its pro rata share of Medicaid costs. These provisions apply to "amounts paid to a State prior to, on, or after the date of the enactment of this Act." Emergency Supplemental Appropriations Act, tit. III, § 3031(c), 113 Stat. at 104.

Clause (ii) appears to have been added by the Senate Appropriations Committee during its markup of the legislation. After considerable floor debate, the Senate defeated a competing amendment offered by Senators Specter, Harkin, Jeffords, and Kennedy that would have required the states to spend part of the settlement on tobacco and health programs rather than remitting it to the federal government. See generally 145 Cong. Rec. at S2828-36 (daily ed. Mar. 17, 1999); id. at S2881-97 (daily ed. Mar. 18, 1999). Much of this debate centered on whether the tobacco settlement funds were a Medicaid settlement, to which the federal government would be entitled to a share. Compare 145 Cong. Rec. at S2885 (daily ed. Mar. 18, 1999) (statement of Sen. Gorton) (stating that the Specter Amendment "makes an assumption, an unwarranted assumption, that these were Medicaid claims that were presented by the States"), and id. at S2887 (statement of Sen. Graham) (arguing that the Medicaid statute "is inapplicable to the tobacco litigation"), with id. at S2829 (daily ed. Mar. 17, 1999) (statement of Sen. Specter) (recognizing that the federal government has a "very strong claim" to a portion of the settlement under Medicaid law), id. at S2885 (daily ed. Mar. 18, 1999) (statement of Sen. Harkin) (stating that the settlement "also includes the Federal share of Medicaid"), id. at S2891 (statement of Sen. Murray) (same), and id. at S2896 (statement of Sen. Kennedy) (same). Proponents of the Specter Amendment argued, in essence, that some portion of the settlement funds belonged to the federal government; therefore, it was appropriate for Congress to direct how this portion should be spent in exchange for waiving federal recoupment. The final vote was 71 to 29 against the Specter amendment. Id. at S2897.

Senators on both sides of the issue recognized the uncertainty about the legal status of the settlement funds and the desirability of congressional resolution in some manner. See, e.g., 145 Cong. Rec. at S2829 (daily ed. Mar. 17, 1999) (statement of Sen. Specter) ("If this legislation is not enacted,

it is possible that there could be very bitter, protracted, and expensive litigation, with the Federal Government asserting its claim under existing law . . . . [State officials] and I agreed that we ought to try to resolve the matter so they would know what is going to happen and their planning would be firm."); id. at S2832 (statement of Sen. Sessions) ("At this point, the Federal Government may or may not have a claim upon that money."). In the Conference Report, the committee recognized that uncertainty over the distribution of the funds would create "litigation over the next several years, delaying the availability of these funds and putting planned State uses on hold" and therefore adopted the provision "in order to permit States which are delaying their plans for the use of these funds the certainty they need to plan their initiatives." H.R. Conf. Rep. No. 106-143, at 99 (1999).

Clause (ii) releases the tobacco settlement funds recovered by the state from any claims Harris had to receive any of this money under federal law. A contrary reading would negate the mandate that all money "recovered" by or "paid" to the state could be used "for any expenditures" it desired. Accord *Strawser, 126 F. Supp. 2d at 1000.* Harris nevertheless presents five reasons that we should read clause (ii) more narrowly, as exempting the state from reimbursing only the federal government: (1) Clause (ii) does not define what funds have been "recovered" by the state; (2) clause (i)'s express exemption of the settlement from federal reimbursement implies that the settlement payments are not similarly exempt from individual reimbursement; (3) a narrow reading is necessary to avoid a disfavored repeal-by-implication; (4) application in this case raises retroactivity concerns; and (5) the legislative history supports a narrower reading. While these arguments have some force, none persuade us to abandon a plain reading of the text.

1. Amounts Recovered or Paid to the State

Harris argues that it "begs the question" to assume that the entire amount of the tobacco settlement constitutes "amounts recovered or paid to the State" within the meaning of § 1396b(d)(3)(B)(ii); rather, he asserts, the states are

entitled only to their "lawfully acquired portion." All of the settlement funds go to the state, however; in plain English, the state has "recovered" or "been paid" funds, even if those funds are in turn owed to a third party. Thus, when § 1396b(d)(3)(B)(ii) refers to money "recovered or paid to the State," it is referring to any money that goes to the state under the tobacco settlement agreement.

2. Expressio Unius

Harris invokes the canon of construction that expressio unius est exclusio alterius - the expression of one thing is the exclusion of another. Because the statute expressly exempts the settlement funds from the requirement that the federal government be reimbursed under the Medicaid laws, he argues, we should not read it impliedly to exempt the funds also from the requirement that individuals be reimbursed. The strength of this canon, however, varies by context. See, e.g., *In re Sealed Case, 337 U.S. App. D.C. 17, 181 F.3d 128, 132 (D.C. Cir. 1999)* (en banc) ("The legal maxim expressio unius est exlusio alterius . . . is not always correct. Rather, . . . the maxim's force in particular situations depends entirely on context, whether the draftsmen's mention of one thing . . . does really necessarily, or at least reasonably, imply the preclusion of alternatives." (quotation marks and alterations omitted)); *In re Continental Cas. Co., 29 F.3d 292, 294 (7th Cir. 1994)* ("We are skeptical of this maxim, for the omission of other items from a list may reflect no more than a belief that other options are provided for elsewhere."). We do not find it compelling to apply the canon as Harris wishes in this case. Harris would have us read clause (ii) as simply reiterating clause (i). We think it is more faithful to Congress's intent to read clause (i) as addressing a specific issue with which Congress was concerned, while clause (ii) was a more general exclusion to preclude other claims similar to those asserted by Harris from tying up these settlement funds.

3. Repeal by Implication

Harris argues that reading § 1396b(d)(3)(B)(ii) to exempt the settlement funds from § 1396k(b) would violate the canon of construction that "repeals by implication are not favored." *United States v. United Continental Tuna Corp., 425 U.S. 164, 168, 47 L. Ed. 2d 653, 96 S. Ct. 1319 (1976).* However, this rule of construction, like others, has to be applied with common sense and appreciation for context. Here, it appears that the new statute is simply a preemptive congressional resolution of a discrete controversy that arose long after the original § 1396k(b) was enacted. The later statute simply addresses one particular application and carves out an exception. We see no repeal-by-implication problem. See also *Strawser, 126 F. Supp. 2d at 1000 n.4.*

4. Retroactivity

Harris asserts that applying § 1396b(d)(3)(B)(ii) in this case raises "serious retroactivity problems." It is unclear what he means by this. Deciding whether a statute should operate retroactively is primarily a question of discerning congressional intent. *Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1148 (10th Cir. 1999)* cert. denied, *Palaganas-Suarez v. Greene, 529 U.S. 1041, 146 L. Ed. 2d 352, 120 S. Ct. 1539 (2000).* Here, as noted above, the statute clearly applies to all funds received under the Master Settlement Agreement, whether past, present, or future. Thus, it is clear that Congress intended for the section to apply retroactively.

Harris might be arguing that applying this section retroactively raises due process questions. With respect to economic legislation, the Due Process Clause requires that retroactivity must further a legitimate legislative purpose through rational means. *General Motors Corp. v. Romein, 503 U.S. 181, 191, 117 L. Ed. 2d 328, 112 S. Ct. 1105 (1992).* Here, the provision eliminated uncertainty over ownership of the funds, thereby freeing the states to use such funds immediately as received. This is sufficient to meet the rational-basis test. Accord *Strawser, 126 F. Supp. 2d at 1002 n.5.* There is no retroactivity problem.

5. Legislative History

Harris argues that the legislative history supports reading § 1396b(d)(3)(B)(ii) as dealing only with reimbursements to the federal government. "Where the language of the statute is plain, it is improper for this Court to consult legislative history in determining congressional intent." *N.M. Cattle Growers Ass'n v. United States Fish & Wildlife Serv., 248 F.3d 1277, 1282 (10th Cir. 2001).* As noted above, we find the language of clause (ii) to be plain. It states that a "State may use amounts recovered or paid to the State as part of a comprehensive or individual settlement . . . for any expenditures determined appropriate by the State." § 1396b(d)(3)(B)(ii) (emphasis added). We find nothing ambiguous in that language.

In any event, if we were to consult legislative history, we find nothing that would lead us to Harris's interpretation of this statute. Indeed, we have found nothing that indicates Congress considered individual claims at all. Thus, the reference to legislative history is unhelpful.

CONCLUSION

Harris's lawsuit is not barred by the Eleventh Amendment, because it seeks prospective relief for Defendants' ongoing alleged violation of federal law and the requested relief does not implicate any special sovereignty interests. On the merits, however, we AFFIRM the district court's dismissal for failure to state a claim upon which relief can be granted, because, pursuant to § 1396b(d)(3)(B)(ii), funds received under the Master Settlement Agreement are not subject to the distribution requirements of § 1396k(b).

Footnotes

* The Honorable Richard Owen, United States District Judge for the Southern District of New York, sitting by designation.

[1] Harris filed this lawsuit as a class action on behalf of all those who have had treatments for smoking-related illnesses paid for by Colorado's Medicaid program "whose claims [for medical expenses] were released by the State of Colorado in the Master Settlement Agreement." Because the district court did not rule on class certification, we refer to the plaintiff as "Harris."

[2] Harris conceded that the settlement "does not specify what portion of the payments to the State of Colorado will be attributable to tobacco related Medicaid costs," and the Seventh Circuit has noted the "nightmarish" administrative problems involved in sorting out the Medicaid share. *Floyd v. Thompson, 227 F.3d 1029, 1038 (7th Cir. 2000).* Harris's complaint seeks payment for (1) all smoking-related medical expenses not covered by Medicaid; (2) the difference between the reasonable value of medical treatments he had received and the amount paid by Medicaid; and (3) the value of future needed medical treatments. This formula seems to assume that the state settled his claims at their full value.

[3] For the purposes of this case, we assume that § 1983 provides a cause of action for violations of the Medicaid provisions at issue here. Amici argue briefly to the contrary. Both the Supreme Court and this court, however, have found that § 1983 creates a private cause of action to enforce other provisions of the federal Medicaid laws. E.g., *Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 512, 110 L. Ed. 2d 455, 110 S. Ct. 2510 (1990)* (discussing § 1396a(a)(13)(A)); *Amisub (PSL) v. Colo. Dep't of Soc. Servs., 879 F.2d 789, 793 (10th Cir. 1989)* (same); cf. *Colo. Health Care Ass'n v. Colo. Dep't of Soc. Servs., 842 F.2d 1158, 1164 n.5 (10th Cir. 1988)* (citing federal appellate cases permitting private causes of action under the Medicaid laws). But cf. *Suter v. Artist M., 503 U.S. 347, 359, 118 L. Ed. 2d 1, 112 S. Ct. 1360 (1992)*

(suggesting in a non-Medicaid case that Wilder might be limited to the particular provision at issue in that case). In any event, absent "exceptional circumstances," we do not ordinarily consider issues raised only in an amicus brief. *Wyo. Farm Bureau Fed'n v. Babbitt, 199 F.3d 1224, 1230 n.2 (10th Cir. 2000).* Although we generally do not accept a party's legal concession on a jurisdiction issue, the statutory issue is not itself jurisdictional. Moreover, because Eleventh Amendment immunity is subject to waiver by Defendants, we would not be precluded from accepting their concession in any event. Cf. *United States ex rel. Long v. SCS Bus. & Technical Inst., 335 U.S. App. D.C. 351, 173 F.3d 890, 892-93 (D.C. Cir. 1999)* (suggesting that a court may accept a state's invitation to decide the merits first).

[4] It is arguable that Harris may not recover tobacco funds that have already been deposited in the state treasury and appropriated for other uses. It is unclear from the record how much money (if any) the state has actually received to date. With respect to these funds, the alleged violation may be the wrongful appropriation of money that belonged to Harris. This action would be wholly in the past, and ordering Defendants to pay Harris for that past conduct would likely be considered "the practical equivalent of money damages." *ANR Pipeline, 150 F.3d at 1189;* cf. *Johns v. Stewart, 57 F.3d 1544, 1554-55 (10th Cir. 1995)* (holding that a suit seeking to recover withheld social-security benefits was barred as to past withholdings but could proceed as to future withholdings). We need not resolve this issue definitively, however; it is clear that most of Harris's suit is not barred by the Eleventh Amendment, and we ultimately reject it on the merits.

[5] We do not agree with the Strawser court's concern on this issue. Our decision would allow a plaintiff to claim the state's accounts receivable only if under federal law those accounts themselves belonged to the plaintiff. That does not imply that a plaintiff could garnish unrelated funds. We express no opinion on this broader question.

[6] Indeed, it is not clear that the state has yet received full reimbursement for its Medicaid payments, in which case

Harris's claim would relate only to some future receipt of funds by the state.

[7] We assume, without deciding, that a portion of the claims settled in the Master Settlement Agreement were for Medicaid claims, because the settlement agreement explicitly included health-related claims and Colorado's complaint sought damages that included amounts for "increased Medicaid payments." But see Watson, *F.3d at (*5), 2001 U.S. App. LEXIS 17436* (holding that Texas did not settle individual Medicaid claims).

Civil Action No. 99-S-953

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

WILFRED L. HARRIS, Individually and as Proposed Class Representative on Behalf of All Others Similarly Situated,
Plaintiff,

v.

BILL OWENS, in his official capacity as Governor of the State of Colorado and JIM RIZZUTO, in his official capacity as Executive Director of the Colorado Department of Health Care Policy and Financing,
Defendants.

July 18, 2000, Decided

July 19, 2000, Filed; July 20, 2000, Entered

COUNSEL:
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JUDGES:
Daniel B. Sparr, United States District Judge.

OPINIONBY:
Daniel B. Sparr

OPINION:

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the court on the January 19, 2000 Recommendation of United States Magistrate Judge Abram that Defendants' Motion to Dismiss (filed September 10, 1999) be granted. The Recommendation was served on the parties by mail or delivery on January 19, 2000. On February 1, 2000, Plaintiff filed his Objections to the Recommendation of the United States Magistrate Judge. On February 14, 2000, Defendants filed their Response to Plaintiff's Objections. The court must make a *de novo* determination of those portions of the proposed findings or recommendations to which specific objection is made. *28 U.S.C. § 636*(b)(1); Fed. R. Civ. P. 72(b).

The court has reviewed *de novo* the Defendants' Motion to Dismiss, Plaintiff's Response (filed October 15, 1999), Defendants' Reply Brief (filed November 1, 1999), the

Recommendation, Plaintiff's Objections, Defendants' Response to Plaintiff's Objections, the pleadings, the exhibits, the entire case file, and the applicable law and is sufficiently advised in the premises.

I. Background

This civil action arises from the settlement of claims brought by the State of Colorado against the major domestic tobacco companies and their trade associations ("the Tobacco Defendants"). The State asserted claims against the Tobacco Defendants pursuant to the Colorado Consumer Protection Act, Colo. Rev. Stat. § § 6-1-101-115, the Colorado Antitrust Act of 1992, Colo. Rev. Stat. § § 6-4-101-122, the Abatement of Public Nuisance Act, Colo. Rev. Stat. § § 16-13-301-316, and the Colorado Organized Crime Control Act, Colo. Rev. Stat. § § 18-17-101-109 ("the Tobacco Litigation"). (Exhibit A to Motion to Dismiss). In November of 1998, the State settled the Tobacco Litigation as part of a nationwide settlement ("the Master Settlement Agreement"). (Exhibit B to Motion to Dismiss). On November 25, 1998, Judge Bayless of the Denver District Court approved a Consent Decree in the Tobacco Litigation. (Exhibit C to Motion to Dismiss). With respect to the settlement funds, the Consent Decree stated:

> The funds provided to the State of Colorado under Section IX of the Agreement are compensation to be held in trust, with specific expenditures to be determined by the General Assembly and Governor through the normal appropriation process. It is the intent and recommendation of the parties to this Agreement that such funds be used for public health purposes only, including, but not limited to, State and local governmental entity health service programs, medical research, and tobacco-related health programs.

(Consent Decree § VI(L) at 10-11, Exhibit C to Motion to Dismiss).

In accordance with the Consent Decree, the Colorado General Assembly enacted Senate Bill 99-172, establishing a special cash fund into which all settlement payments are to be placed and subjected to appropriation by the General Assembly, and Senate Bill 99-231, directing that the first $ 33 million in settlement payments plus no less than 20 % of all subsequent payments under the Master Settlement Agreement be placed in a trust fund. (Exhibits D and E to Motion to Dismiss).

Plaintiff, as a proposed representative of a class of Medicaid recipients who have received treatment paid by Medicaid for smoking-related illnesses, seeks a portion of the funds the State obtained as a result of settling the Tobacco Litigation. Plaintiff claims that because the money due to the State from the settlement of the Tobacco Litigation exceeds the amount of Medicaid expenses the State has incurred, Plaintiff and the putative class of Medicaid recipients are entitled under federal Medicaid law, *42 U.S.C. § 1396k*(b) and *42 C.F.R. § 433.154(c)*, to the excess amounts obtained by the State. The Defendants in this civil action are Governor Bill Owens and Executive Director of the Colorado Department of Health Care Policy and Financing Jim Rizzuto. Plaintiff purportedly seeks to enjoin the Defendants from:

> depositing any of the settlement funds into the State Treasury or dispersing such funds for any purpose until such time as the court determines what portion of the tobacco settlement belongs to plaintiffs and those similarly situated. . . .

(Complaint P 48). Plaintiff also purportedly seeks declaratory relief as follows:

> The State Defendants must adhere to federal law, *42 U.S.C. § 1396k*(b) and *42 C.F.R. § 433.154(c)*, which entitles plaintiff, and those

> similarly situated, to a portion of the settlement funds to be paid by the Tobacco Company defendants to the State of Colorado.
> . . .

(Complaint P 53).

II. Standard of Review

Defendants move to dismiss this civil action: (1) pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction because this civil action is barred by the Eleventh Amendment to the United States Constitution, and (2) pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted because the federal Medicaid law relied on by Plaintiff is inapplicable to the tobacco settlement funds.

The determination of subject matter jurisdiction is a threshold question of law. *Madsen v. U.S. ex rel. U.S. Army Corps, of Engineers, 841 F.2d 1011, 1012 (10th Cir. 1987).* The court applies a rigorous standard of review when presented with a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. *Consumers Gas & Oil, Inc. v. Farmland Indus., Inc., 815 F. Supp. 1403, 1408 (D. Colo. 1992).* "The party invoking federal jurisdiction bears the burden of proof." *Marcus v. Kansas Dept. of Revenue, 170 F.3d 1305, 1309 (10th Cir. 1999).* "Motions to dismiss pursuant to Rule 12(b)(1) may take two forms." *Amoco Production Co. v. Aspen Group, 8 F. Supp. 2d 1249, 1251 (D. Colo. 1998).* First, a party may attack the facial sufficiency of the complaint and the court must accept the allegations of the complaint as true. Id. (citation omitted). Second, a party may attack the factual assertions regarding subject matter jurisdiction through affidavits and other documents. Id. (citation omitted). The court "has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Holt v. United States, 46 F.3d 1000, 1003 (10th Cir. 1995).* The present motion appears to be in the nature of a facial attack, wherein the court must accept the allegations in the complaint as true.

In considering whether dismissal is proper under Rule 12(b)(6), the court must accept all well-pleaded allegations as true and construe them in the light most favorable to the non-moving party. *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); Sutton v. Utah State School for Deaf and Blind, 173 F.3d 1226, 1236 (10th Cir. 1999).* Dismissal under Rule 12(b)(6) is warranted only where the non-moving party can prove no set of facts in support of the claims which would entitle it to relief. Id.

III. Plaintiff's Objections

1. Magistrate Judge Abram agreed with Defendants that the federal Medicaid law relied upon by Plaintiff is inapplicable to the State's tobacco settlement funds. Title *42 U.S.C. § 1396k*(b) provides:

> Such part of any amount collected by the State under an assignment made under the provisions of this section shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder or such amount collected shall be paid to such individual.

42 U.S.C. § 1396k(b) (2000). Plaintiff's first objection to the Recommendation is almost identical to his argument in his response to Defendants' motion. (*See* Plaintiffs' Objection pp. 5-12, Plaintiffs Response pp. 12-20). While Plaintiff acknowledges that the Tobacco Litigation was not a recovery action under the Medicaid statute pursuant to an assignment of rights, he nevertheless asserts that the State must distribute the settlement funds pursuant to § 1396k(b).

There is no authority for Plaintiff's position. Section 1396k(b) applies to amounts collected by the State under an

assignment made by an individual Medicaid recipient. The Tobacco Litigation was not a Medicaid recovery action pursuant to an assignment of rights. The State alleged no claims in the Tobacco Litigation for the recovery of Medicaid funds it expended in treating smoking-related illnesses. The Tobacco Litigation did not involve recovery under assigned claims.

In addition, the Master Settlement Agreement does not establish that the Tobacco Defendants are third parties who may be liable to pay for care and services pursuant to § 1396k(a)(1)(C). *See* Tyler v. Douglas, 2000 U.S. Dist.m LEXIS 20444, *5, Civil No. 1:00CV39, slip op. at 4 (D. Vt. (June 21, 2000)). Section 1396k(b) does not entitle Plaintiff to the State's tobacco settlement funds.

Nor does the State's release of medical expense claims arising out of tobacco-related illnesses trigger the reimbursement scheme set forth in § 1396k(b). The release provisions of the Master Settlement Agreement indicate that the claims of individual tobacco users, including Plaintiff's, were not released by the State. (Exhibit B to Motion to Dismiss § II(pp), pp. 14-15).

Further, "Congress has amended the Medicaid Act with the apparent purpose of, *inter alia*, avoiding the type of litigation which this plaintiff seeks to pursue." Tyler v. Douglas, slip op. at 4. On May 21, 1999, Congress amended the Medicaid Act to add subparagraph (B) to *42 U.S.C. § 1396b*. Section 1396b(d)(3)(B) provides:

> (i) Subparagraph (A) and paragraph (2)(B) shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products, as defined in *Section 5702(d) of Title 26*, and State Attorneys General, or as part of any individual State settlement or judgment reached in litigation initiated or pursued by a State against one or more such manufacturers.

> (ii) Except as provided in subsection (i)(19), a State may use amounts recovered or paid to the State as part of a comprehensive or individual settlement, or a judgment, described in clause (i) for any expenditures determined appropriate by the State.

This amendment negates Plaintiff's argument under § 1396k(b) that he is entitled to any amount remaining after the State and the United States have been reimbursed for the actual costs incurred for the treatment of Medicaid recipients for smoking-related illnesses.

Because the settlement of the Tobacco Litigation did not give rise to a right of recovery by Plaintiff, Magistrate Judge Abram correctly recognized that § 1396k(b) does not apply to the tobacco settlement funds and recommended dismissal of Plaintiff's Complaint.

2. Magistrate Judge Abram also agreed with Defendants that the Eleventh Amendment bars Plaintiff's claims. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of any Foreign State.

The Supreme Court has construed the Eleventh Amendment to mean that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan, 415 U.S. 651, 662-63, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974).*

However, state sovereignty is not absolute. Under the "so-called Ex parte Young 'exception' to the Eleventh Amendment," a private party may sue a state official for prospective injunctive or declaratory relief from an ongoing violation of the Constitution or federal laws. *ANR Pipeline Co. v. Lafaver, 150 F.3d 1178, 1188 (10th Cir. 1998), cert.*

denied, 525 U.S. 1122, 119 S. Ct. 904, 142 L. Ed. 2d 902 (1999). See *Ex parte Young, 209 U.S. 123, 159-60, 52 L. Ed. 714, 28 S. Ct. 441 (1908); see also Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240, 2267, 144 L. Ed. 2d 636 (1999)* (affirming the continuing validity of Ex parte Young, that sovereign immunity does not bar certain actions against state officials for injunctive or declaratory relief). The Tenth Circuit has explained the Ex parte Young doctrine:

> When a suit names a state official as the defendant, the Eleventh Amendment still bars the action if 'the state is the real, substantial party in interest.' Whether the state is the real party in interest turns on the relief sought by plaintiffs. Suits that seek prospective relief are deemed to be suits against the official, while suits that seek retroactive relief are deemed to be suits against the state.

Powder River Basin Resource Council v. Babbitt, 54 F.3d 1477, 1483 (10th Cir. 1995) (quoting *Ford Motor Co. v. Department of Treasury of State of Indiana, 323 U.S. 459, 464, 89 L. Ed. 389, 65 S. Ct. 347 (1945)).* "When a party seeks only prospective equitable relief - as opposed to any form of money damages or other legal relief - then the Eleventh Amendment generally does not stand as a bar to the exercise of the judicial power of the United States." *ANR Pipeline, 150 F.3d at 1188* (citations omitted).

Plaintiff argues that the Eleventh Amendment does not bar his claims "against state officials where the relief sought is to require an official's prospective compliance with federal law." (Plaintiff's Objections p. 13). "Of course, because of the important interests of federalism and state sovereignty implicated by the Ex parte Young doctrine," the Eleventh Amendment may still bar some forms of injunctive relief against state officials for violation of federal law. *ANR Pipeline 150 F.3d at 1188.* While a federal court may grant an injunction that governs a state official's future conduct, it may not grant an injunction that awards retroactive monetary relief. *Pennhurst State School & Hosp. v. Halderman, 465*

U.S. 89, 102-03, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984). Although the Ex parte Young doctrine "will allow injunctive relief that might have a substantial ancillary effect on a state treasury, it does not allow an award for monetary relief that is the practical equivalent of money damages, even if this relief is characterized as equitable." *ANR Pipeline, 150 F.3d at 1189* (citation omitted).

In recent years, the Supreme Court has further narrowed the scope of the Ex parte Young doctrine. *ANR Pipeline, 150 F.3d at 1189.* The Tenth Circuit has recognized that Idaho v. Coeur d' *Alene Tribe of Idaho, 521 U.S. 261, 138 L. Ed. 2d 438, 117 S. Ct. 2028 (1997),* "imposes an important additional requirement" upon the application of *Ex parte Young. J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1286 (10th Cir. 1999).* Now, in an Ex parte Young case, "we must examine whether the relief Plaintiff[] seek[s] against the state officials implicates special sovereignty interests, and whether that requested relief is the functional equivalent to a form of legal relief against the state that would otherwise be barred by the Eleventh Amendment." *Valdez, 186 F.3d at 1286.* "The Ex parte Young doctrine may not be used to support prospective federal court injunctive relief against state officials when that relief is just as much an intrusion on state sovereignty as an award of money damages." *ANR Pipeline, 150 F.3d at 1190.* "We must not extend the Ex parte Young doctrine to allow a suit for prospective equitable relief when that relief would be just as intrusive, if not more so, into core aspects of a state's sovereignty." *ANR Pipeline Co. 150 F.3d at 1190.*

In this case, Plaintiff requests declaratory and injunctive relief to remedy actions by the Defendants that Plaintiff alleges are violations of federal law. Plaintiff argues that the Ex parte Young doctrine applies to his request for payment of his share of the tobacco settlement funds because the relief requested is directed to future violations of federal law and the effect on the State treasury is ancillary rather than compensatory. (Plaintiff's Objections pp. 15-19). The court disagrees.

While Plaintiff attempts to characterize his claims as seeking prospective injunctive relief, Plaintiff admittedly seeks an order awarding him a portion of the State's tobacco settlement funds. (Plaintiff's Objections p. 16). Because the named Defendants do not have individual control over the funds sought by Plaintiff, any order awarding a portion of the funds to Plaintiff would operate directly on the State. The tobacco settlement funds Plaintiff seeks are assets of the State that would be paid as money damages out of the state treasury. The relief sought by Plaintiff would have the retroactive effect of divesting the State of a portion of these assets. Although some of these payments would occur in the future, Plaintiff's requested relief has more than an ancillary effect on the state treasury and "is the practical equivalent of money damages." *ANR Pipeline, 150 F.3d at 1189; see* Tyler v. Douglas, slip op. at 5-6; *Barton v. Summers, 111 F. Supp. 2d 989* (M.D. Tenn. (2000)); *Floyd v. Thompson, 111 F. Supp. 2d 1097, 1101 (W.D. Wis. 1999) argued on appeal, 227 F.3d 1029 (7th Cir. 2000).*

Plaintiff's requested relief would also constitute "an intrusion on state sovereignty." *ANR Pipeline Co. 150 F.3d at 1190.* The State has an important sovereign interest in the control and expenditure of state funds. *See Kelley v. Metropolitan County Bd. of Educ., 836 F.2d 986, 995 (6th Cir. 1997), cert. denied, 487 U.S. 1206, 101 L. Ed. 2d 885, 108 S. Ct. 2848 (1988); Colorado General Assembly v. Lamm, 700 P.2d 508, 519-20 (Colo. 1985); see also 42 U.S.C. § 1396b*(d)(3)(B) (giving the State control over the use of the tobacco settlement funds); Exhibit C to Motion to Dismiss, Consent Decree § VI(L) at 10-11 (same); Senate Bills 99-172 and 99-231 (giving General Assembly control over tobacco settlement funds). Plaintiff's requested relief intrudes upon state sovereignty.

3. Finally, Plaintiff objects that Magistrate Judge Abram did not properly consider his alternative request for leave to amend his Complaint. (Plaintiff's Objections p. 24). Plaintiff proposed to amend his Complaint to "modify the class definition to include Medicaid recipients who have yet to be treated for any tobacco related diseases at this time but who

may be treated for them in the future," in order to avoid the State's Eleventh Amendment defense. (Plaintiff's Response to Defendants' Motion p. 24; Plaintiff's Objections p. 24).

While Fed. R. Civ. P. 15(a) requires leave to amend be freely given, that requirement does not apply where an amendment obviously would be futile. *TV Communications Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1028* (10th Cir.), *cert. denied, 506 U.S. 999, 121 L. Ed. 2d 537, 113 S. Ct. 601 (1992)* (citations omitted). Where a complaint as amended would be subject to dismissal, leave to amend need not be granted. Id.

The court agrees with Defendants that Plaintiff's proposed amended Complaint would also be barred by the Eleventh Amendment. Because Plaintiff's proposed amendments would be futile, Plaintiff's alternative request to amend his Complaint is properly denied.

IV. Conclusion

Because the relief sought by Plaintiff is the practical equivalent of money damages and an intrusion on state sovereignty, Plaintiff's claims are barred by the Eleventh Amendment. Therefore, this court lacks subject matter jurisdiction and the Complaint must be dismissed. Further, because *42 U.S.C. § 1396k*(b) is inapplicable to the Tobacco Litigation settlement funds sought by Plaintiff, Plaintiff's Complaint fails to state a claim upon which relief can be granted and must be dismissed.

Accordingly, IT IS ORDERED:

1. The January 19, 2000 Recommendation of United States Magistrate Judge Abram is ACCEPTED.

2. Defendants' Motion to Dismiss is GRANTED.

3. This civil action is DISMISSED.

DATED at Denver, Colorado, this 18th day of July, 2000.

BY THE COURT:

Daniel B. Sparr

United States District Judge

No. 00-1292

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILFRED L. HARRIS, Individually and as Proposed Class Representative on Behalf of All Others Similarly Situated,
Plaintiff-Appellant,

v.

BILL OWENS, in his official capacity as Governor of the State of Colorado; JIM RIZZUTO, in his official capacity as Executive Director of the Colorado Department of Health Care Policy and Financing,
Defendants-Appellees,

Filed October 31, 2001

ORDER

Before EBEL, Circuit Judge, McWILLIAMS, Senior Circuit Judge, and OWEN*, District Judge.

Appellant's and Appellees' respective petitions for rehearing are denied. The petitions for rehearing en banc were transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member panel and no judge in regular active service on the court requested that the court be polled, those petitions are also denied.

Entered for the Court

PATRICK FISHER, Clerk of Court

by:
Deputy Clerk

Footnotes

* The Honorable Richard Owen, United States District Judge for the Southern District of New York, sitting by designation.